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**FEDERAL ELECTION COMMISSION**

999 E Street, N.W. 2007 DEC 10 P 3:23  
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**SENSITIVE**

**FIRST GENERAL COUNSEL'S REPORT**

MUR: 5925

DATE COMPLAINT FILED: 07/16/07

DATE OF NOTIFICATION: 07/20/07

LAST RESPONSE RECEIVED: 07/31/07

DATE ACTIVATED: 09/19/07

EXPIRATION OF SOL: 06/2012

**COMPLAINANT:** Erie County Republican Committee

**RESPONDENTS:** Kyle Foust  
Foust for Congress (f/k/a Kyle Foust Congressional  
Exploratory Committee)<sup>1</sup> and Randall Rinke, in his  
official capacity as treasurer  
Friends of Kyle Foust

**RELEVANT STATUTES:** 2 U.S.C. § 437c(b)(1)  
2 U.S.C. § 441d(c)(2)  
11 C.F.R. § 100.72  
11 C.F.R. § 100.74  
11 C.F.R. § 100.131  
11 C.F.R. § 100.94  
11 C.F.R. § 100.155  
11 C.F.R. § 110.11(c)(2)(ii)

**INTERNAL REPORTS CHECKED:** Disclosure Reports

**FEDERAL AGENCIES CHECKED:** None

<sup>1</sup> The complaint named and the Commission notified Kyle Foust Congressional Exploratory Committee as the respondent committee in this matter. According to the response, the respondent committee changed its name from Kyle Foust Congressional Exploratory Committee to Foust for Congress when it filed its statement of organization on July 23, 2007. This name change followed Foust's filing of his statement of candidacy on July 19, 2007. Because Foust for Congress appears to be the same committee that was notified, this Report, unless otherwise specified, hereinafter will refer to the respondent committee as "Foust for Congress (f/k/a/ Kyle Foust Congressional Exploratory Committee) and Randall Rinke, in his official capacity as treasurer, ('Foust Committee')."

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**I. INTRODUCTION**

The complaint in this matter alleges that Kyle Foust and Foust for Congress (f/k/a Kyle Foust Congressional Exploratory Committee) and Randall Rinke, in his official capacity as treasurer, ("Foust Committee") violated the Commission's "testing the waters" regulations by using non-federal funds for federal exploratory activities through their reference to Foust's county council re-election website in a fundraising letter sent by his Congressional exploratory committee. The complaint further alleges that the letter failed to include a disclaimer containing a printed box as required by 2 U.S.C. § 441d(c)(2), and the requisite IRS disclaimer required by 26 U.S.C. § 6113.

As discussed in more detail below, information from the response and corroborated by publicly available sources indicates that the Respondents did not use non-federal funds to "test the waters." Accordingly, we recommend that the Commission find no reason to believe that Kyle Foust and the Foust Committee violated 11 C.F.R. §§ 100.72 and 100.131, or that Foust's state political committee, Friends of Kyle Foust, violated the Act in connection with these activities. In addition, although the disclaimer was deficient without the printed box, based on the small civil penalty we recommend that the Commission exercise its prosecutorial discretion to dismiss the allegations that the Foust Committee violated 2 U.S.C. § 441d(c)(2) and 11 C.F.R. § 110.11(c)(2)(ii) and send an admonishment letter. Finally, we recommend that the Commission dismiss for lack of jurisdiction the allegation that the Foust Committee violated 26 U.S.C. § 6113 and close the file.

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II. FACTUAL AND LEGAL ANALYSIS

A. Testing the waters

Kyle Foust is an Erie County councilman and a Democratic primary candidate in Pennsylvania's 3rd Congressional District. Sometime before July 6, 2007 and prior to becoming a federal candidate, Foust sent an undated letter seeking support for the Kyle Foust Congressional Exploratory Committee. See Attachment 1 at 1. The stated purpose of the letter was for Foust to "gauge the viability" of a federal candidacy. See *id.* This letter referred the readers to Foust's county council re-election website, [www.kylewfoust.com](http://www.kylewfoust.com), to learn more about the candidate's background and record as a public official. The complaint alleges that this reference resulted in the use of non-federal funds for "testing the waters" activities in connection with Foust's federal candidacy.

In their response, Kyle Foust and the Foust Committee argue that the letter's reference to the website was not a contribution under the Act, citing to the *Campaign Guide for Congressional Candidates and Committees*, which states that websites prepared by a volunteer will not be considered a contribution. Response at 1. The response further states that "[t]he same volunteer created a website for Kyle Foust federal and non-federal campaigns" and that "nowhere on the nonfederal website is there any mention or reference to the Congressional Exploratory Committee or the federal election." *Id.*

Foust's assertion that a volunteer hosted and maintained the website appears to be corroborated by information available in the public domain. Around the time of the complaint, the referenced website, [www.kylewfoust.com](http://www.kylewfoust.com), contained a disclaimer that the website was paid for by the Friends of Kyle Foust, Foust's state committee. See Attachment 2. This website has since been changed and now contains a disclaimer that the website is "Paid for by Friends of

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1 Kyle Foust" and "Web Design by Marni Alward." *See* Attachment 3. In addition, the content of  
2 the website has been removed, and it now redirects individuals to [www.foustforcongress.com](http://www.foustforcongress.com).  
3 *Id.* The new website, [www.foustforcongress.com](http://www.foustforcongress.com), states that it is "Paid for by John & Marni  
4 Alward" and "authorized by Foust for Congress." *See* Attachment 4. Moreover, the Foust  
5 Committee's contention that the website was paid for by a volunteer, and not the Committee, is  
6 reflected in the Committee's October 2007 Quarterly Report by the absence of any Internet  
7 related expenditures or payments made to John or Marni Alward.

8 Sections 100.72 and 100.131 of the Commission's regulations exclude from the  
9 definition of contributions and expenditures funds received and payments made solely for the  
10 purpose of determining whether an individual should become a candidate. However, if the  
11 individual subsequently becomes a candidate, the funds received and payments made are  
12 contributions and expenditures subject to the reporting requirements of the Act. *See* 11 C.F.R.  
13 §§ 100.72 and 100.131. Because funds raised for purposes of "testing the waters" may later be  
14 subject to federal restrictions and reporting requirements, "[o]nly funds permissible under the Act  
15 may be used for such activities." *Id.*

16 Section 100.74 of the Commission's regulations, however, provides that the value of  
17 services provided without compensation by any individual who volunteers on behalf of a  
18 candidate or political committee is not a contribution. The regulations further exempt volunteer  
19 Internet activity, when provided by an individual without compensation, from the definition of  
20 "contribution." *See* 11 C.F.R. § 100.94. This exemption applies to both an individual's  
21 uncompensated personal services related to Internet activities and his or her use of equipment or  
22 services, including domain name services, for uncompensated Internet activities, regardless of  
23 who owns the equipment and services. *See id.* Furthermore, "individuals may be reimbursed by

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1 political committees for any out-of-pocket expenses they incur in performing Internet activities  
2 and still remain within the exemptions of 11 C.F.R. §§ 100.94 and 100.155.” *Explanation and*  
3 *Justification for Internet Communications*, 71 Fed. Reg. 18605 (April 12, 2006). Thus, if  
4 volunteers created and maintained www.kylewfoust.com, the reference to the website in the  
5 Foust Committee’s letter did not constitute a contribution under the Act and therefore could not  
6 have resulted in the improper use of nonfederal funds for testing the waters activities.

7 As a result, the reference to the website and the use of the candidate’s information  
8 contained therein is not a contribution to the Foust Committee. Accordingly, we recommend that  
9 the Commission find no reason to believe that Kyle Foust and the Foust Committee violated 11  
10 C.F.R. §§ 100.72 and 100.131, or that Friends of Kyle Foust violated the Act.

11 **B. Disclaimer**

12 The letter sent by Kyle Foust and the Foust Committee contained a disclaimer at the  
13 bottom which read: “Paid for by the Kyle Foust Congressional Exploratory Committee, 5517  
14 Zemville Drive ~ Erie, PA 16509.” See Attachment 1 at 1. The disclaimer, however, was not  
15 enclosed in a printed box. In their response, Kyle Foust and the Foust Committee acknowledged  
16 that “the fundraising letter in question does not follow the letter of the law,” but asserted that the  
17 letter complied with the “intent of the law.”<sup>2</sup>

18 Under the Act, whenever a political committee makes a disbursement for the purpose of  
19 financing any communication through any mailing, or solicits any contribution through any  
20 mailing, such communication, if paid for and authorized by a candidate, an authorized political  
21 committee of a candidate, or its agents, shall clearly state that the communication has been paid

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<sup>2</sup> Based on the response and the Foust Committee’s reported expenditure of \$2,761.37 for this mailing, we infer that the letter was a mass mailing as defined in 11 C.F.R. § 100.27. It was, therefore, a public communication subject to the disclaimer requirements of the Act and Commission regulations. See 11 C.F.R. §§ 100.26; 110.11(a)(1).

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for by such authorized political committee. *See* 2 U.S.C. § 441d(a). Among other requirements, disclaimers for printed communications must be contained in a printed box set apart from the other contents of the communication. *See* 2 U.S.C. § 441d(c)(2); 11 C.F.R. § 110.11(c)(2)(ii).

Because the letter lacked a printed box around the disclaimer, the Foust Committee appears to have violated 2 U.S.C. § 441d(c)(2) and 11 C.F.R. § 110.11(c)(2)(ii). According to the general guidelines for opening settlement offers in cases where there is a disclaimer, but it fails a 441d(c) requirement, we calculate the civil penalty at 10% of the cost of the communication or \$2,750 if we lack cost information. Based on a review of the Foust Committee's 2007 October Quarterly Report, it appears that the Committee paid \$848 to print and \$1,913.37 to mail the letters, for a total cost of \$2,761.37. Applying 10% to this amount, plus the 25% pre-probable cause discount, yields a civil penalty of \$207 ( $\$2,761.37 \times 10\% \times 75\% = \$207$ ) rounded to \$200. Based on this low civil penalty amount, we recommend that the Commission dismiss as a matter of prosecutorial discretion the disclaimer allegation and send an admonishment letter to the Foust Committee. *See, e.g.,* MUR 5876 (Bowman) (dismissal and admonishment where civil penalty was less than \$500 based on 10% of the cost of communication); MUR 5865 (New Trier Democratic Organization) (dismissal and admonishment where civil penalty was \$600 based on 10% of cost of communication).

### C. IRS Notice Requirement

The complaint alleges that Kyle Foust and the Foust Committee violated 26 U.S.C. § 6113 by failing to include a notice on the letter informing contributors that contributions are not tax deductible. The Commission does not have jurisdiction to enforce this section of Title 26. *See* 2 U.S.C. § 437c(b)(1); *see also*, 26 U.S.C. § 7801(a)(1) ("[e]xcept as otherwise expressly provided by law, the . . . enforcement of [Title 26] shall be performed by or under the

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supervision of the Secretary of the Treasury"). Accordingly, we recommend dismissal of this allegation.

**III. RECOMMENDATIONS**

1. Find no reason to believe that Kyle Foust and Foust for Congress (f/k/a Kyle Foust Congressional Exploratory Committee) and Randall Rinke, in his official capacity as treasurer, violated 11 C.F.R. §§ 100.72 and 100.131.
2. Find no reason to believe that Friends of Kyle Foust violated the Act.
3. Dismiss as a matter of prosecutorial discretion the allegation that Foust for Congress (f/k/a Kyle Foust Congressional Exploratory Committee) and Randall Rinke, in his official capacity as treasurer, violated 2 U.S.C. § 441d(c)(2) and 11 C.F.R. § 110.11(c)(2)(ii) and send an admonishment letter.
4. Dismiss for lack of jurisdiction the allegation that Foust for Congress (f/k/a Kyle Foust Congressional Exploratory Committee) and Randall Rinke, in his official capacity as treasurer, violated 26 U.S.C. § 6113.
5. Approve the attached Factual and Legal Analysis.
6. Approve the appropriate letters.

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7. Close the file.

Thomasenia P. Duncan  
General Counsel

12-10-07  
Date

BY: Kathleen M. Guith  
Kathleen M. Guith  
Acting Deputy Associate General Counsel  
for Enforcement

Julie K. McConnell  
Julie K. McConnell  
Acting Assistant General Counsel

William A. Powers  
William A. Powers  
Attorney

Attachments:

1. Foust Committee Letter
2. July 17, 2007 print-out of [www.kylewfoust.com](http://www.kylewfoust.com)
3. October 16, 2007 print-out of [www.kylewfoust.com](http://www.kylewfoust.com)
4. October 16, 2007 print-out of [www.foustforcongress.com](http://www.foustforcongress.com)
- 5.

10044282049



# Kyle Foust Congressional Exploratory Committee

5517 Zemville RD, Erie, PA 16509

[kylefoust@hotmail.com](mailto:kylefoust@hotmail.com)

FEDERAL ELECTION  
COMMISSION  
OFFICE OF GENERAL  
COUNSEL

2007 JUL 16 A 9:59

Dear Friend:

Thank you. Your support has made my work as an Erie County Councilman productive and meaningful. I look forward to continuing our work together. Over these years, many of you have asked me to consider a run for Congress in Pennsylvania's 3<sup>rd</sup> District. While I'm committed to Erie County and all that we've accomplished, I've heard you.

I have decided to form a Congressional Exploratory Committee. The purpose of the Committee is to gauge the viability of my candidacy by raising funds to conduct issue research and meet people throughout the district. Many people have been eager to help. I've attached a list in the hope you will consider joining your many friends and family already committed.

It's no secret we need better representation in Pennsylvania's 3<sup>rd</sup> Congressional District. By coming together now, we can send a powerful message about our desire to focus on what we care about - our goals, our values. Today's political reality is this: fundraising efforts must begin well before Election Day. I'm asking for your help. Your contribution to my Exploratory Committee - your public pledge of support - will impact the viability of my candidacy.

I've had the opportunity these past few weeks to visit with supporters, elected officials, and party committee leaders across the region. They know me and are excited about this opportunity to create change on the federal level. Some of you may be less familiar with my background and record as a public official. I encourage you to visit my County Council Re-Election website at [www.kylewoust.com](http://www.kylewoust.com). Additional information on my public record can be obtained on the website of the Erie Times-News at [www.goerie.com](http://www.goerie.com) and by searching for "Kyle Foust."

Please do not hesitate to call me directly at home 814-899-4519, or send me an e-mail at [kylefoust@hotmail.com](mailto:kylefoust@hotmail.com). I'm also happy to address a group and answer questions in person. To be added to the Exploratory Committee list, just send an email and I'll add your name. I do hope to hear from you.

Thank you for your time and consideration.

Warm Regards:

*Kyle Foust*

Kyle W. Foust

PS I've enclosed an envelope for your contribution. \$25, \$50, \$100 or whatever you're comfortable giving will go a long way in demonstrating the 3<sup>rd</sup> congressional district is committed to change. Please mail your check today.

Note: Federal campaign law requires that individual contributions not exceed \$2300 per election cycle or \$5000 for PAC contributions.

ATTACHMENT 1

Page 1 of 3

Paid for by the Kyle Foust Congressional Exploratory Committee

5517 Zemville Drive ~ Erie, PA 16509

21

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To comply with Federal Law, we must use our best efforts to obtain, maintain and submit the name, mailing address, occupation and name of employer of individuals whose contributions exceed \$200 per election cycle.

Name \_\_\_\_\_

Address \_\_\_\_\_

City/State/Zip \_\_\_\_\_

Occupation \_\_\_\_\_ Employer \_\_\_\_\_

E-Mail \_\_\_\_\_ Phone \_\_\_\_\_

Please identify which election cycle to designate this contribution. (check one)

☐ Primary Election 2008

☐ General Election 2008

Level of Contribution: ☐ \$200 ☐ \$500 ☐ \$1000 ☐ \$2300 ☐ \$5000

Paid for by the Kyle Foust Congressional Exploratory Committee

21

**Kyle Foust Congressional Exploratory Com.**

5517 Zernville Drive

Erie, PA 16509

21

**Kyle Foust Congressional Exploratory Com.**

5517 Zernville Drive

Erie, PA 16509

ATTACHMENT 1

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# Kyle Foust Congressional Exploratory Committee

5517 Zemville RD, Erie, PA 16509

kylefoust@hotmail.com

**Fiore Leone**  
Chairman,  
Erie County Council

**Pat Harkins**  
PA State Rep., 1<sup>st</sup> District

**Mark A. DiVecchio**  
Erie County Executive

**Robert Merski**  
Erie County Sheriff

**Joe Giles**  
Erie County Councilman,  
2<sup>nd</sup> District

**Linda Bebeko-Jones**  
Former PA State  
Representative, 1<sup>st</sup> District

**Ronald "Whitey" Cleaver**  
Erie Co. Councilman, 4<sup>th</sup> District

**Casimir Kwitowski**  
Erie City Controller

**Susan DiVecchio**  
Erie City Treasurer

**David Gonzalez**  
Erie City Councilman

**Rubye Jenkins-Husband**  
President, Erie City Council

**Jim Thompson**  
Erie City Councilman

**Joseph Schember**  
Erie City Councilman

**Pat Cappabianca**  
Erie City Councilman

**Jessica Horan-Kimco**  
Erie City Councilman

**Dan Harmon**  
Business Manager,  
Plumber & Steamfitters Local #47

**Chip Folletti**  
Business Manager,  
Carpenters Local #81

**Jeanette McCrory**  
Erie City School Director

**Jim Walczak, Esq.**  
Erie County, North East Twp.

**Dale Roth**  
Erie County, Newbarnack Twp.

**Mike Alberico**  
Business Manager,  
IBEW Local # 56

**Karen Dorich**  
President, AFSCME  
Local #2666

**Sue Beard**  
Former Aid Coordinator,  
Erie Weed and Seed

**Bob Tullio**  
Erie County, City of Erie

**Vincent Kennerknecht**  
Chairman, Center Erie Co.  
Democratic Committee

**Al and Peggy Richardson**  
Erie County, City of Erie

**Daria Reymore**  
Erie County, City of Erie

**Al Wood**  
Chairman,  
Corry Democratic Party

**David and Jean Eller**  
Center Erie County  
Democratic Committeepersons

**Joe Lasniowski**  
WWII, "Band of Brothers" Veteran

**Rodger Gregorich**  
Capt., PA State Police (Retired)  
Former Troop Com., Troop E, Erie

**Steve Smith**  
Erie County, City of Erie

**Rob McGahan**  
Harbor Creek School Director

**Dave Chiaramonte**  
Erie County, Summit Twp.

**Brian McGrath**  
Millcreek Township Supervisor

**Carl J. Anderson III**  
Erie County, City of Erie

**Brenda English**  
Erie County, Girard Twp.

**Michael Pennock**  
Erie County, Contractor

**Tina Frying, Esq.**  
Erie Co., Wattsburg Borough

**Trevor Pearson**  
Erie County, Harborcreek Twp.

**Gerald D. Lee III**  
Erie County, City of Erie

**Kevin and Barbara Kantz**  
West Erie Co. Democratic Committee

**Joe Maloney**  
Erie Co., Millcreek Township

**Denise Fabian**  
Erie County, City of Erie

**Rob Brim**  
Erie County, Fairview Twp.

**Jeffrey Miako, Esq.**  
Erie County, City of Erie

**Bill Beardsley**  
Tax Collector,  
North East Borough

**Sam Talarico**  
Pres., Iroquois Education Assoc.  
Erie 5<sup>th</sup> Ward Dem. Committeeman

**Kevin Cariddi**  
Butler County

**Linda Linville**  
Erie County, Millcreek Twp.

**Ed Brennan**  
Warden, SCI-Albion, Ret.

**Chris and Rick Mitchell**  
East Erie Co. Dem. Committee

**Edison Nicholson III**  
Academic Support Center  
Erie County, City of Erie

**Joseph Talarico**  
President, Butler County  
Democrats for Change

**Dale Niemanski**  
Business Manager,  
Operating Engineers Local #66

**Jim Young**  
Former U.S. Congressional  
Candidate

**Henther Hancock**  
Erie Co., Harborcreek Twp.

**Eric Seggi**  
Staff Representative  
NABET, CWA

**George Sommer**  
Business Rep  
Sheet Metal Workers Local #12

**Al Ropelewski**  
City of Erie  
Purple Heart Recipient

**Evan Adair**  
Erie Co. Millcreek Township

ATTACHMENT 1

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10044282053

**RE-ELECT  
KYLE FOUST  
ERIE COUNTY COMMISSIONER  
ERIE, PENNSYLVANIA**

**VOLUNTEER**

Name :

Street :

City :

State :

Zip :

Email :

Phone :

How you can help:

Please submit how you are able to help.

**Contributions may be mailed to:**

**Friends of Kyle Foust  
4856 Daniels Street**

ATTACHMENT 2  
Page 1 of 2

Erie, PA 16510

**WAYS TO  
VOLUNTEER**

**Yard signs  
Door-to-door  
Phone calls**

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ATTACHMENT 2  
Page 2 of 2

Please go to  
[WWW.FOUSTFORCONGRESS.COM](http://WWW.FOUSTFORCONGRESS.COM)

Please go to  
[WWW.FOUSTFORCONGRESS.COM](http://WWW.FOUSTFORCONGRESS.COM)

Please go to  
[WWW.FOUSTFORCONGRESS.COM](http://WWW.FOUSTFORCONGRESS.COM)

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Web Design by Marni Alward

# KYLE FOUST for U.S. CONGRESS

3rd District of Pennsylvania



## A Leader Who Gets Results

Welcome to my website.

I appreciate your interest in my campaign for Congress in the 3rd District of Pennsylvania.

The United States stands at the forefront of great change. To seize this opportunity, our Country needs new leadership. As I've served on Erie County Council for the last 3 1/2 years, and as I've traveled throughout all seven counties of the Congressional District, I have been encouraged by many of you who respect my independence, my worth ethic, and my integrity.

Please consider participating in my campaign either as a donor or a volunteer. Remember that "working separately, we can achieve little, working together, we can achieve so much."

Author unknown.

## NEW ENDORSEMENT

Following discussions over the weekend, I am pleased to announce that Richard Friedberg, Mayor, City of Meadville has pledged his public support of my candidacy.

"Having Richard on my side is a big boost to the campaign that, fortunately, has been going strong since we announced in July. Richard is as knowledgeable as anyone on the issues, especially as federal issues relate to the concerns of local government."

## LABOR ENDORSEMENTS



Iron Workers Local 3, representing over 1300 Iron Workers across Western PA

Great Lake Building Trades, representing 3000 members and 16 unions in Erie, Crawford and Warren Counties

UE Local 506 and 618, representing over 3000 members at GE's Lawrence Park plant

"UE Local 506 and 618, the Great Lakes Building Trades, and Iron Workers Local 3 are fixtures in this Congressional District. It is through their advocacy and dedication that members of their unions continue to benefit from family-sustaining wages and health care coverage. I thank them for the honor of their endorsements and assure them that I will continue to fight in Congress for family-sustaining wages and health care for all Americans."

### ABOUT KYLE

Born in 1967, Kyle is the sixth of eight children born to former Erie County Councilman and Democratic Chairman Paul Foust and Jacque Foust. He is a lifelong Democrat and lifelong resident of the 3rd Pennsylvania Congressional District. He graduated in 1985 from Harbor Creek High School, received his Bachelor of Arts from Mercyhurst College in 1989, received his Master of Arts from Edinboro University in 2001, and is currently writing his doctoral dissertation at Duquesne University. Kyle is currently employed as Assistant Director of Career Services at Mercyhurst College, and has been married ten years to Bridget Hannon Foust. He and his wife reside in Harborcreek Township in Erie County.

Kyle Foust was overwhelmingly elected to a seat on Erie County Council in 2003 by defeating a six-year Republican incumbent. He was unopposed on both major party tickets in last spring's primary election and captured the Republican nomination by garnering eighty-eight write-in votes.

In his years serving the people of Erie County, Councilman Foust has proved to a popular centrist, attracting wide support from Democrats, Republicans, and independents. He has delivered on all campaign promises by announcing a one-time

repeal of an unpopular real estate assessment appeal fee, re-establishing the Erie County Human Relations Commission, and enacting a Strategic Plan to stabilize and build County libraries. He has also exercised strong fiscal restraint by helping to create a healthy surplus in the County fund balance and opposed a recent pay increase for Council members. He was the primary proponent of a historic Project Labor Agreement requiring prevailing wage and local Union employment for County of Erie construction contracts.

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